UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Tracy, California)

EVERGREEN NEW HOPE HEALTH &
REHABILITATION CENTER

Employer

and Case 32-RC-4872

LOCAL 250 HEALTH CARE WORKERS
UNION, SERVICE EMPLOYEES
INTERNATIONAL UNION (SEIU), AFL-CIO,
CLC

Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

On May 11, 2001, I issued a Decision and Direction of Election in this matter in which I found, inter alia, that the Employer had not met its burden of establishing that the registered nurses sought to be represented by Petitioner possessed supervisory authority within the meaning of Section 2(11) of the Act. I also found that the record did not contain sufficient information to establish the unit placement of registered nurse Aurora Nervasa and Assistant Medical Data Services Coordinator Debra McFarland and concluded that they should be permitted to vote under challenge. Thereafter, on May 14, 2001, the Employer filed a Request for Review on the grounds that the record established the supervisory authority of the Employer's registered nurses. On June 20 2001, the Board issued its Order remanding the proceeding to reopen the record on the issue of whether the Employer's registered nurses "assign" and "responsibly direct" other

employees and the scope of and degree of "independent judgment" used in the exercise of such authority in light of the Supreme Court's May 29, 2001 decision in NLRB v. Kentucky River Community Care, 121 S.Ct. 1861 (2001). The Board also remanded the proceeding and reopened the record for the purpose of determining the unit placement of Nervasa and McFarland. The Employer's request for review was denied in all other respects.[1]

As set forth in my earlier decision, there are presently four full-time RN charge nurses employed at the facility: Paulette Pavlukev, Judy Cabrera, Diane Garrett and Loly Gonzalez. There are also two on-call RN charge nurses: Josefina Solana and Beatriz Villanueva.[2] Additionally, since on or about November 11, 2000, Aurora Nervasa has been employed as a temporary RN charge nurse on the night shift on an on-call basis. The Employer also employs Minerva Soleta as a full-time RN day supervisor who works Monday through Friday, and Remedios Cantos as an on-call weekend RN nurse supervisor. Finally, the Employer employs RN Debra McFarland as an Assistant Medical Data Set Coordinator (AMDSC).

The Charge Nurses

I take official notice of the July 7, 2000 representation hearing record in Evergreen New Hope Health & Rehabilitation Center, Case 32-RC-4776. There, the

[1] In my previous decision, I found that the RNs do not have authority to discipline employees. At best, they make non-effective recommendations that are thoroughly investigated by the DON prior to any disciplinary action. The Board Order specifically set forth the issues for remand and did not include my finding with respect to the RN's authority to discipline. Nevertheless, the Employer presented additional evidence at the remand hearing regarding the authority of the registered nurses to discipline employees. Inasmuch as such evidence is beyond the scope of the remand order, and because there is no indication that such evidence was newly acquired, I have not relied on or fully addressed in this supplemental decision the newly proffered evidence regarding the nurse's purported disciplinary authority.

[2] In my previous decision I excluded Villanueva from the unit because she did not have a sufficient regularity of employment with the Employer.

identical parties submitted evidence on whether the Employer's LVNs should be included in the unit with its CNAs. That record reflects that there are 10 CNAs assigned to the day shift, 7-8 CNAs assigned to the PM shift, and 5 CNAs assigned to the night shift. Management personnel, including DON White and Director of Staff Development (DSD) Sally Armstrong, are present at the facility during the day shift and part of the PM shift, from 8:00 a.m. to 5:00 p.m. After they leave, for a period of 14 to 16 hours starting during the PM shift, the charge nurse is the highest-ranking person at the facility. However, DON White is on-call 24 hours a day. Charge nurses contact her when problems arise, including such matters as outside disturbances, leaky roofs, patient related issues, operational issues, and personnel issues.[3]

When a patient is admitted to the facility, an assessment of his or her condition is performed by the Medical Data Set Coordinator, and a care plan is created which specifies the patient's needs and sets forth the care to be received. All departments participate in formulating the plan. Further care plan assessments are performed on the 5th, 7th, and 14th day of the patient's stay at the facility, or more often if needed. The patient care plan also outlines the directions for all the staff for the daily care of the patient and governs how care is to be provided to the patient. The patient care plan is constantly updated and kept for staff review at the nurses station. All changes to the plan are carefully recorded in the patient chart kept at the nurses station. All employees, including CNAs, are required to be aware of and follow the patient care plan.

[3] The Employer argues on brief that the charge nurses contact DON White solely to give information about what they have done. However, the record does not support such a conclusion. The examples that DON White provided concerning nurses calling to tell her what they had done involved disciplinary incidents, a matter not in issue in this portion of the proceeding.

In addition to the patient care plans, the facility also provides detailed and comprehensive nursing care manuals for RNs and a separate patient care manual for CNAs. The manuals contain protocols for all nursing and patient care procedures. For example, if a nurse wanted assistance on how to clamp off a catheter, the nurse would look up the catheter procedure required by the Employer and simply follow it. Other matters for which policies and procedures are set forth in the 1000+ page nursing care manual include: patient assessments; admission/discharge; diabetic care; dietary needs; eye/ear/nose/throat issues; emergency policy; gastrointestinal, genital and urinary issues; post mortem care; psycho-social issues; rehab nursing; renal dialysis; resident rights; respiratory issues; restraints; physical/chemical issues; safety; skin care; special services; theft and loss; and treatment issues.[4] The manuals are kept at both nursing stations and are used as guides by all employees for following required procedures and practices. Other manuals required to be available at the nurses station cover information control, facility standards, dietary standards, and safety. In addition, wound care, rehabilitation, respiration, and integrated care manuals are also available. If something is not covered in a manual, CNAs ask the charge nurses for assistance. However, often the charge nurses are unavailable and the CNAs go directly to DON White or the DSD for assistance.

The Employer's job description for charge nurses is divided into patient care functions and administrative functions. The job description states that as a patient care function, charge nurses supervise and evaluate all direct care provided within the assigned unit and initiates corrective action as necessary. Under the administrative function, the job description states that charge nurses provide clinical supervision to nursing assistants.

[4] Only 12 pages of the nurses care manual were entered in evidence by Petitioner.

Not withstanding the job description, the evidence shows that charge nurses are, in effect, "attached" to a medicine cart. They administer medicine, perform patient assessments, fill out patient incident reports, and direct and monitor the CNAs' work to make sure that patient care is delivered properly in accordance with the Employer's standards and protocols. For example, if a combative patient is injured when handled by a CNA, the charge nurse directs the CNA not to attempt to administer care for agitated patients while the patient is so agitated. If, for another example, only one CNA is attempting to lift a patient using a mechanical hoist, the charge nurse will advise them to get another CNA to assist, as the Employer's protocol requires two employees to perform this task. Similarly, if a CNA is not getting a patient out of bed properly, the charge nurse teaches or demonstrates the proper procedure, or if a CNA is moving a patient too quickly, the charge nurse will tell the CNA to slow down. The charge nurse will also show the CNA a better technique to perform a task such as cleaning out a patient's eye. Such procedures and techniques originate from facility management and many of these procedures are included in the nursing care manuals and patient care manuals. CNAs will give similar directions to each other in how to follow the Employer's protocols.[5]

The CNAs report to the charge nurses, who are accountable for the operation of the shift. Although the DSD assigns the CNAs to care for the patients in particular rooms, there is evidence that the charge nurses may tell CNAs where to work and may assign a CNA to leave one task and do another. For example, I take further notice of the record in Case 32-RC-4776, which established that if a call light is on while the CNA assigned to a particular patient is on break, the charge nurse can assign another CNA to

[5] The record indicates that charge nurses may be disciplined for failing to ensure that CNAs complete their tasks. However, the record does not reveal any evidence that any charge nurse has ever been disciplined for a CNAs' poor performance.

leave the task he or she is performing to answer the call. Similarly, the instant record shows that if a patient does not want to be cared for by the assigned CNA, for example, if there is some conflict between the CNA and the patient, the charge nurse can assign a room trade.

In addition, when CNAs call in that they are unable to work their assigned shifts, a charge nurse is responsible for going through the Employer's established protocol to obtain additional employees. First, the charge nurse attempts to contact an on-call employee. If there are no available on-call employees, the charge nurse may seek to have an off duty CNA come in to work. The parties' collective bargaining agreement covering the CNAs and LVNs sets forth the procedures by which such employees are contacted and requires that employees be called in accordance with seniority. No employee can be required to report to work by a charge nurse. Thus, there are times when nothing further can be done by the charge nurse to obtain a CNA because there are no other CNAs to call. In these circumstances the facility operates short-staffed.

Charge nurses are required to get permission to change the CNA staffing levels. Thus, if a charge nurse believes more CNAs should be added to the shift than are set forth in the schedule, she must ask permission. There is no evidence in the record to establish whether such a belief is based on staffing ratios or an assessment of patient needs and employees' ability to complete the tasks at hand. Thus, on one occasion there was only one CNA scheduled on the floor during lunch. The RN supervisor discovered that there was a typographical error in the schedule, that two CNAs were supposed to have been scheduled, and she made a staffing adjustment. However, on another occasion, when only two CNAs were scheduled, the charge nurse believed that staffing was insufficient

and wanted three CNAs. The charge nurse contacted administrator Ruby Rakow, but was not allowed to add a third CNA. The record does not reveal any other instances of charge nurses even attempting to change the staffing levels.

Similarly, charge nurses do not have the ability to alter scheduled activities on their shifts. For example, if a charge nurse wishes to change the patient shower schedule, she must obtain permission from the DSD. Such changes cannot be unilaterally made by the charge nurse because they may impact other activities and change operational flow.

Training is provided to CNAs by the DSD who conducts regularly scheduled mandatory in-service meetings two or three times per month. The in-service meetings allow the CNAs to meet certification requirements. Unscheduled in-service meetings are also conducted by the DSD on a variety of topics. For example, if patient incident reports establish a need to review certain procedures and protocols, an unscheduled in-service meeting is held. I take further notice of the record in Case 32-RC-4776 that the DSD also performs the yearly evaluations for CNAs based on her own observations of the CNAs' job performance. The CNAs' hours are scheduled by the DSD. The DSD also determines the CNAs' room assignments, which are documented in an assignment book at the nurses station.

RN Supervisors [6]

State law requires that, seven days a week, there must be a RN who is designated as a supervisor and who is not assigned to a medication cart. Accordingly, the Employer also employs Minerva Soleta as a full-time RN day supervisor who works Monday through Friday, and Remedios Cantos who works as an on-call weekend RN nurse supervisor. DON White testified that the RN supervisor acts as an extra pair of eyes and

[6] The Employer uses the terms RN supervisor and floor supervisor interchangeably.

helping hands to assist the charge nurses. The record reflects that union-represented LVNs may also be assigned as RN supervisors during the week.[7] RN supervisors have the same authorities as charge nurses and direct CNAs in the performance of their duties. For example, they direct employees to pull bed curtains to protect patient dignity; tell employees to come back to their stations after breaks are completed; and direct them to answer call lights after patients complain that calls have not been answered. DON White further testified that the RN supervisors have the same authority as the charge nurses to assign work to CNAs

Assistant MDS Coordinator

The Employer also employs RN Debra McFarland as the Assistant Minimum Data Set (MDS) coordinator. In that capacity, she compiles computerized patient assessment data that is reported to the State of California. She reports to the MDS coordinator Kathy Potter, a stipulated supervisor. Although McFarland must go to the nurses station to collect data, she has no patient care responsibilities, does not assign duties to the CNAs, and does not have a work station on the unit. Rather, her desk is in the office next to Potter. While McFarland is an RN, the record on remand establishes that such licensure is not a job requirement for the AMDSC position. McFarland also is assigned full shifts as a charge nurse or RN supervisor when needed, once or twice every two weeks depending on whether there are staff shortages. Although working as a charge nurse or RN supervisor is not part of the job description of the AMDSC position, when McFarland works on the patient care unit, she receives the AMDSC rate of pay.

POSITIONS OF THE PARTIES

[7] The only applicable RN function that LVNs are not licensed to perform is the starting of intravenous (IV) antibiotics.

The Employer urges that the petition should be dismissed because all of the RNs employed at the facility are supervisory employees by virtue of their authority to assign and responsibly direct employees and should be excluded from the bargaining unit. In addition, the Employer contends that Nervasa is a temporary employee and that AMDSC McFarland does not share a community of interest sufficient to be included in a unit with the other RNs.

The Union contends that the Employer has failed to establish that the RNs described in the record are statutory supervisors because the record does not establish that they exercise the authority to assign and responsibly direct employees with a sufficient degree of independent judgment. With respect to McFarland, the Union contends that she should be included in the unit with the other RNs. The Union also contends that although Nervasa is designated a temporary on-call employee, her hours meet the eligibility requirements to warrant her inclusion in the unit.

ANALYSIS

The Charge Nurses and RN Supervisors

On May 29, 2001, the Supreme Court issued its decision in NLRB v. Kentucky River Community Care, 121 S.Ct. 1861 (2001). In the underlying Board case, the Board had included six registered nurses employed at a mental health care facility in the bargaining unit, finding that the employer had not met its burden of establishing that the registered nurses were supervisors within the meaning of Section 2(11) of the Act. The Court affirmed the Board's finding that the burden of proof rests with the party asserting the existence of supervisory status. However, the Court found that the Board erred in determining that the registered nurses were not statutory supervisors. In doing so the

Court rejected the Board's conclusion that the registered nurses did not exercise "independent judgment" when they exercised ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with the employer's standards.

Here, consistent with the holding of Kentucky River, and without relying on a conclusion that their judgment is merely based on their professional or technical skill and experience, I, nevertheless, again conclude that the Employer has failed to establish that the charge nurses and RN supervisors are supervisors within the meaning of Section 2(11) of the Act. It is undisputed that charge nurses and RN supervisors have the same authorities. Accordingly, the following analysis applies to both types of registered nurses, henceforth referred to collectively as nurses.

The Authority to Assign

The Employer asserts that the nurses exercise the authority to assign employees. However, in the "Assignment of Nursing Care" section of the nursing care manual, it states that the charge nurse is responsible for assigning direct resident nursing care to the nursing staff according to the unit plan (emphasis supplied). In view of this language and the apparently broad scope of the Employer's manuals and protocols, it appears that the authority and the degree of independent judgment exercised by the nurses is considerably circumscribed by the Employer's written policies, procedures, and protocols. An analysis of each type of assignment contained in the record also fails to establish that the nurses exercise independent judgment in making assignments. Thus, the responsibility of the nurses to get a CNA to replace an absent employee is performed routinely and strictly in accordance with the Employer's protocol and contractual seniority procedures. Calling

the employees set forth on a pre-set list and asking them if they would like to replace a scheduled employee is more clerical than managerial, particularly as there is no authority vested in the nurse to require any CNA to report to work. Once the nurse exhausts the list, she has no options or discretion to do anything other than accept the fact that the shift will operate short-staffed. See Harborside Healthcare, Inc., 330 NLRB No. 191, slip op. at 3 (April 24, 2000). Similarly, the Employer failed to establish that nurses can independently alter the scheduled staffing level, or effectively recommend changes in the staffing level, even when they believe that staffing is inadequate.

DON White testified broadly that nurses have the authority to assign duties to CNAs, tell CNAs where to work, and take a CNA off one task and assign him or her elsewhere. The record does not establish what factors the nurses consider in making such decisions, what protocols may apply, and what degree of independent judgment they must exercise in making these decisions. Thus, the record reflects that the nurses are authorized to assign a CNA to answer the call light of another CNA on break. This temporary substitution of one CNA for another based on availability and in furtherance of prompt care appears to be routine in nature and does not appear to require the use of independent judgment on the part of the assigning nurse. If there are circumstances under which such an assignment does require independent judgment, the Employer did not provide evidence in the record regarding those circumstances. For example, there is no evidence that the nurses weigh the abilities or experience of one CNA over another, or weigh the acuity level of the respective CNAs' patients prior to assigning one CNA to answer another CNA's call light. Absent detailed evidence of independent judgment, conclusionary statements without supporting evidence are insufficient to establish

supervisory status. See Quadres Environmental Co., 308 NLRB 101, 102 (1992) (citing Sears Roebuck & Co., 304 NLRB 193 (1991)).

Similarly, the record reflects that if a patient complains about the CNA who has been assigned to him or her in the assignment book, a nurse can assign another CNA to the patient by trading rooms. However, again the record does not establish under what circumstances the nurses are authorized to make such a trade, what factors the nurse is to consider in making such a decision, what protocols apply, and what degree of independent judgment the nurse must exercise in making these decisions. While the authority to re-assign a CNA to a different room may require some level of independent judgment, without knowing the factors that determine how and whether a trade will be made, it cannot be concluded on this record that such assignments involve the use of sufficient independent judgment to establish that the nurses who make the room trades are statutory supervisors. As the Board held in Phelps Community Medical Center, 295 NLRB 486, 490 (1989), "Whenever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least not on the basis of those indicia."

Other than the above, the record is devoid of incidents or examples of nurses exercising the authority to assign CNAs. The Employer neither called a CNA nor a nurse to testify regarding how duties are assigned or under what other circumstances nurses assign CNAs to work. Accordingly, it cannot be concluded that nurses exercise sufficient independent judgment in assigning CNAs to warrant a finding that the nurses are supervisors as defined in the Act. See The Door, 297 NLRB 601 1990 (quoting Phelps Community Medical Center, 295 NLRB 486, 490 (1989)).

The Authority Responsibly to Direct

The Employer contends that the nurses utilize independent judgment to responsibly direct the CNAs. However, the record shows that most of the directions they give are either rudimentary in nature or have their origin in the individualized patient care plan, the nurses care manual, the CNA patient care manual, or other written directions developed according to the Employer's desired standards. In Providence Hospital, 320 NLRB 717 (1996). Enfd. Sub nom. Providence Alaska Medical Center v. NLRB, 121 F.3d 548 (9th Cir. 1997), the Board found that RN charge nurses with the responsibility to direct employees were not statutory supervisors because not every act of assignment or direction is made with Section 2(11) authority. The Board quoted with approval the court in NLRB v. Security Guard Service, 384 F. 2d 143, 151 (5th Cir. 1967):

> If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

Here, the instant record includes instances of nurses directing or reminding CNAs to pull a bed curtain to protect a patient's dignity, to get help when using a mechanical lift, to come back to his or her station after break; to move a patient more slowly, or to answer a call light. These directions and reminders are derived from either common sense or the Employer's applicable written protocols and require little or no application of independent judgment.

Other directions such as showing a better eye-care technique or a better technique to get patients out of bed are also based on the Employer's protocols and are more instructional than managerial. As such, CNAs give the same sorts of directions to their co-workers. Just as pointing out mistakes to employees and demonstrating correct

procedures do not establish the authority to discipline, neither do they establish, without more, the authority to responsibly direct. See e.g. Crittendon Hospital, 328 NLRB No. 120, slip op. at 5 (June 30, 1999).

The record also reflects that nurses direct CNAs to delay giving care to a patient who is combative, so as to avoid injury to themselves or the patient. Presumably this advice is also set forth in the Employer's safety manual and nursing care manual and is consistent with the Employer's obligation to safely care for its residents. The record does not indicate whether the CNAs themselves can make an assessment to delay care for a combative patient and simply report the matter to the nurse, or whether there are standing orders prohibiting CNAs from caring for combative patients. It is clear, however, that the CNAS are themselves responsible for the safe care of the patients. While there may be independent judgment utilized when a nurse determines that a particular patient is too combative to be cared for safely, this authority is derived from the nurses' responsibility to supervise the task of giving clinical care to the patient rather than the Employer's need to supervise or maintain control of its staff.[8]

[8] To the extent that the testimony of DON White shows that nurses have been instructed that they can send employees home for misconduct, such as sleeping on the job or insubordination, such evidence is really related to the supervisory indicia of discipline rather than the direction of work. Even if such evidence were considered under the indicia of directing work, the evidence indicates that this authority is derived from nothing more than the Employer's standing order, which apparently is observed only in its breach. There is no evidence that this alleged directive has ever been carried out by a nurse. Indeed, I take official notice of DON White's testimony in Case 32-RC-4776 that a CNA was discovered by a nurse to be sleeping on the job. No action was taken by the nurse other than to leave a note to DON White. Thereafter, DON White conducted a formal investigation and issued a reprimand to the CNA. Similarly, in the record in Case 32-RC-4776, there is evidence indicating that a CNA had failed to follow instructions to such a degree that the nurse believed that the CNA should be removed from the shift. The CNA was not sent home, and DON White refused to take any action against the CNA other than to instruct her to do her work. There was no indication that the nurse considered using her purported authority to send a CNA home for insubordination. Thus, even assuming that sending employees home for misconduct constitutes directing work rather than a disciplinary action, the evidence regarding the nurses' possession of this ostensible authority does not meet the threshold to establish that the nurses possess the authority to responsibly direct the CNAs. The Board has long held that supervisory authority cannot be based on alleged authority that has not in fact been exercised. See S. S. Joachim & Anne Residence, 314 NLRB 1191, 1194 (1994).

Finally, the Employer argues that the nurses must be statutory supervisors because, if they are not, there is no supervision at the Employer's facility for most of the PM shift and all of the night shift. I do not find this argument dispositive in light of the DON being on-call 24 hours a day for responding to nurses' calls regarding a wide range of patient care and personnel concerns. The fact that the staffing level for nurses is reduced by 50 percent during the night shift also indicates that patient care and other activities in the facility diminish greatly during those times to the extent that the Employer does not require on site supervision.

I find that the nurses neither assign nor responsibly direct employees with a degree of independent judgment that rises to the statutory threshold. Assignment of employees to answer a call light or handle a different patient in light of a patient complaint are routine matters that do not evince the required independent judgment to establish statutory authority. The authority to assign work alone, without the use of independent judgment, is not indicative of supervisory authority. See McGraw-Hill Broadcasting Co., Inc., 329 NLRB No. 48, slip op. at 6 (Sept. 30, 1999). Similarly, direction to help another employee, to answer a call light, or to delay care until a patient is non-combative are directions regarding the manner of the CNAs' performance of discrete tasks which they have already been directed to perform by the Employer by virtue of its comprehensive protocols and procedures as set forth its patient care plans and nursing care manuals. See Chevron Shipping Co., 317 NLRB 379, 381 (1995), cited with approval in Kentucky River.

The Board reached a similar conclusion in Dynamic Science, Inc., 334 NLRB No. 56 (2001). There, the Board reconsidered the record concerning the statutory authority of

artillery test leaders in light of the Court's holding in Kentucky River. The leaders had extensive responsibilities overseeing artillery testers. Upon reaching a site the leader and crew members were required to follow written standard operating instructions. The leaders were responsible for the safe execution of the tests; however, it was the responsibility of all the testers to follow the written instructions. The Board found that despite their responsibilities, the test leaders' role was sufficiently circumscribed by detailed orders and regulations issued by the employer and concluded that their use of independent judgment fell below the threshold required to establish Section 2(11) authority. Here, as in Dynamic Science, the Employer holds all employees responsible for following extensive, written procedures and protocols in delivering patient care.

Based on the foregoing, and the record as a whole, I find that the Employer has again failed to meet its burden of presenting sufficient evidence to establish that the nurses are statutory supervisors within the meaning of the Act. Accordingly, I shall include them in the unit herein. See Providence Hospital, 320 NLRB 7171 (1996), enfd. sub nom. Providence Alaska Medical Center v. NLRB, 121 F.3d 548 (9th Cir. 1997); see also NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 583 (1994).

Aurora Nervasa

As set forth above, the Employer contends that Aurora Nervasa should be excluded from the unit, as she is a temporary employee working in an on-call status. Nervasa was hired as a temporary charge nurse on about October 2000, and was told her position would continue until the Employer filled a full-time charge nurse position. As of the time of the original hearing, the Employer had been unable to fill that full-time position for the night shift. As of the second hearing in this case, the Employer had three

unfilled positions on the night shift, and no applications for these positions had been submitted. Nervasa has continued to work throughout this period on an on-call basis, and the Employer still does not know how long Nervasa will continue to be employed. Thus, at present, it appears that Nervasa's employment may continue for a lengthy period of time, and her tenure still remains uncertain. In these circumstances, I have concluded that she is not ineligible to vote due to the fact that she was, at least initially, hired as a temporary employee, and she will be treated as an on-call employee for purposes of determining her eligibility to vote. See St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992); Boston Medical Center Corp., 330 NLRB No. 30, slip op. at 15 (1999).

In determining whether on-call employees should be included in the bargaining unit, the Board considers whether the employees perform unit work and the regularity of their employment. Here there is no dispute that Nervasa performs unit work.. With regard to the regularity of employment issue, the Board has found that the regularity requirement can be satisfied when an employee has worked a substantial number of hours within the period of employment prior to the eligibility date. Trump Taj Mahal Casino, 294 NLRB 294, 295 (1992); Mid-Jefferson County Hospital, 259 NLRB 831 (1981). Under the Board's longstanding and most widely used test, an on-call employee is found to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee averages four or more hours of work per week for the quarter immediately prior to the eligibility date. Trump, supra, citing Davison-Paxon Co., 185 NLRB 21, 23-24 (1970).

Here, the record establishes that during the months of April 2001 through June 2001, the quarter immediately proceeding the issuance of this decision, Nervasa worked

66.4 hours, an average of 5.1 hours per week. Thus, she meets the eligibility standards for an on-call employee. Accordingly, she is included in the unit herein.

The AMDSC

It is undisputed that when McFarland works as the AMDSC, she has no patient care responsibilities, performs in a purely administrative capacity and, unlike the nurses, she works under the direction of the MDS. While she has a RN license in common with the other nurses, the record is clear that the Employer does not require the person working as the AMDSC to have an RN license. As such, I find that McFarland does not share a community of interest with the other registered nurses simply by virtue of her license. See Ralph Davies Medical Center, 256 NLRB 1113 (1981).

However, McFarland also works as a substitute for charge nurses and RN supervisors in the patient care unit, when no one else is available to fill those positions. The record reflects that she does so once or twice every two weeks, or 10 to 20 percent of her time. I find that McFarland is essentially a dual-function employee. The Board has long held that dual-function employees may be included in the unit if they perform duties similar to unit employees to a sufficient degree and with sufficient regularity to demonstrate that they have a substantial interest in the unit's wages, hours, and working conditions. See Berea Publishing Company, 140 NLRB 516 (1963). Here, I find that McFarland's performance of unit work only 10 to 20 percent of the time does not establish a sufficient community of interest to be included in the unit. Accordingly, I shall exclude McFarland from the unit herein. See Wilson Engraving Company, 252 NLRB 333 (1980) (15 to 20 percent of time spent in unit insufficient to establish a

community of interest); Martin Enterprises, Inc., 325 NLRB 714 (1998) (10 percent of time spent in unit insufficient to establish community of interest).

Petitioner is currently recognized by the Employer in a bargaining unit consisting of all full-time and regular part-time licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees including cooks, housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed by the Employer at its facility located at 2586 Buthmann Avenue, Tracy, California; excluding professional employees, technical employees, business office clerical employees, dietary/supervisor cooks, guards and supervisors as defined by the Act.[9]

Petitioner seeks by means of an *Armour-Globe*[10] self determination election to add to this unit a residual unit consisting of non-management registered nurses (RNs), subject to the majority of the votes being cast in favor of Petitioner.

Accordingly, I shall direct a self-determination election among the following employees:

> **All full-time and regular part-time registered nurses (RNs) employed by the Employer at its Tracy, California facility; but excluding the director of nursing (DON), director of staff development (DSD), medical data set coordinator (MDS), assistant medical data set**

[9] On July 31, 2000, I issued a Decision and Direction of Election in Case 32-RC-4776, which involved the same parties as the instant case, wherein I found that the classification of licensed vocational nurses serving as charge nurses at the Employer's facility is not one that is supervisory under the Act. On August 23, 2000, the Employer's request for review of my Decision was denied by the Board, and on August 29, 2000, a majority of the LVNs voted to be included in the preexisting unit.

[10] See, Globe Machine & Stamping Co., 3 NLRB 294 (1937); Armour & Co., 40 NLRB 1333 (1942); see also Ten Broeck Commons, 320 NLRB 806, 814 (1996) (Board ordered a self-determination election to include licensed practical nurses (LPNs) in an existing service and maintenance unit, while noting that whether a separate technical unit of LPNs is appropriate in a non-acute care facility such as a nursing home is an issue decided on the facts of each case requiring additional litigation.)

coordinator (AMDSC), all other employees, guards, other professional employees, and supervisors as defined by the Act.

If a majority of ballots are cast for the Petitioner, they will be taken to have indicated the employees' desire to be included in the existing unit of all full-time and regular part-time licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees including cooks, housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed at the Tracy, California facility; excluding professional employees, (other than registered nurses), technical employees, business office clerical employees, dietary/supervisor cooks, guards and supervisors as defined in the Act. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented. In any event, an appropriate certification will issue.

There are approximately eight (8) employees in the voting group.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.[11] Eligible to vote are those in the voting group who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as

[11] Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

such during the eligibility period and their replacements. Those in the military service of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by Local 250, Health Care Workers Union, Service Employees International Union (SEIU), AFL-CIO, CLC.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before August 17, 2001. No extension of time to file this list shall be granted except in

extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570.

This request for review must be received by the Board in Washington, D.C. by August 24, 2001.

Dated at Oakland California this 10th day of August, 2001.

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James S. Scott, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

32-1228

Digest Numbers:
177-8520-0800-0000
177-8520-1600-0000
177-8520-2400-0000
177-8520-3900-0000
177-8520-9200-0000
177-8560-1500-0000
177-8580-8050-0000
460-5067-7050
460-5067-8200
470-1733-0100